

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC WINBUSH,

Defendant-Appellant.

UNPUBLISHED
February 20, 2007

No. 264012
Kent Circuit Court
LC No. 03-000310-FC

Before: Sawyer, P.J., and Neff and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316, assault with intent to murder, MCL 750.83, possession of a firearm during the commission of a felony, MCL 750.227(b), and possession of a firearm by a felon, MCL 750.224(f). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to life imprisonment for first-degree murder, life imprisonment for assault with intent to murder, two years' imprisonment for felony-firearm, and two to five years' imprisonment for felon in possession of a firearm. Defendant appeals by delayed leave granted, and we affirm.

The charges arose from the murder of Kamar Merriweather. There was testimony that on December 21, 2002, Merriweather, driven by his friend Luke Brewster, met with defendant to transact a drug deal. Upon arriving at the meeting place, defendant entered the back seat of the car driven by Brewster. When the drug deal fell through, defendant emerged from the car. He then shot into the car from the passenger side, killing Merriweather. There was also a second shooter, who fired shots into the Brewster vehicle from the driver's side of the car. That shooter was not identified, but defendant was later identified in a photographic lineup by Brewster.

Defendant first asserts that the trial court abused its discretion when it admitted irrelevant evidence, the probative value of which was substantially outweighed by the danger of unfair prejudice, MRE 403. This Court reviews a trial court's ruling regarding the admission of evidence for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). "[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock (On Remand)*, 469 Mich 247, 269; 666 NW2d 231 (2003). "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id.*

At trial, Grand Rapids Police Department officer Thomas Bush testified that he spoke with Brewster on the night of the shooting, that Brewster told him that “E” shot him, and that Brewster told him that “E” himself had been shot in August 2002 and left to die in a field. The court admitted this evidence, and informed the jury of a court file regarding a charge of assault with intent to murder in which Norman Muhammad was the defendant, and defendant was the complainant. Officer Bush testified that he passed the information on to detectives familiar with the August shooting to assist in determining “E’s” identity. Another detective testified that he used the information of the prior shooting to get defendant’s name and included defendant’s photo in the array shown Brewster during which Brewster positively identified defendant as the person who shot at him on the evening in question. This evidence was relevant to corroborate Brewster’s identification, and was thus relevant. Further, its prejudicial impact was slight, given that the crimes at issue *in this case* placed defendant in an environment of drugs and guns, and given that defendant himself was a victim.

Defendant next argues that the prosecutor committed prosecutorial misconduct in violation of defendant’s constitutional due process rights. Generally, a claim of prosecutorial misconduct is a constitutional issue we review de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* Each issue is decided on a case-by-case basis, and the prosecutor’s remarks must be reviewed in context. *Id.* at 272-273. The alleged misconduct is considered in light of all of the facts of the case, *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997), and examined in light of the defendant’s arguments and the evidence presented at trial, *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). Improper remarks may not require reversal if they are responsive to matters raised by the defense. See *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

Defendant argues that the prosecutor improperly shifted the burden of persuasion and proof to the defense when stating:

Good morning. I had waited with anticipation for her opening statement, which was the statement she made at the beginning of the trial. I had wondered what he was going to put forward as a defense. Let’s face it. I knew what Jamal Glenn said. Jamal Glenn said he was in the car and he shot into the car. I knew that Andrew Zeeman – took a statement from him where he describes this crime exactly. I knew that Jonitta Collins identifies him as shooting into the car, and I knew that Luke Brewster identified him as shooting into the car. So, I was wondering, what is the defense going to be?

After the trial court overruled defendant’s objection, the prosecutor continued:

My point is that I heard her say that this case was a mess. We had talked during jury selection that life is messy. So, should you expect the case to be other than messy? But, I didn’t hear any defense put forth. So, I waited now for her closing argument, and we’ve heard that, and heard it. And, I heard her say the same thing, that the case is mess, and, therefore, Mr. Winbush isn’t guilty. I still don’t know what the defense is. I don’t know that I can cover each point that she made, because, frankly, she hop-scotches, and she takes things out of context. So, this is the best I’m going to be able to do.

Here, the gist of the prosecutor's argument was responsive to defendant's theory that the prosecutor's case was "a mess" and therefore not proven. The prosecutor conceded that the prosecution had the burden of proof, stating there are only two questions, "what crime, and have I proven that he did it?" Defense counsel had argued that the prosecution's case was full of "missing pieces" and made up of weak physical evidence and unreliable witnesses. The prosecution's remarks implying that defendant was obliged to "put forth a defense" were ill-advised. However, taken as a whole, the rebuttal argument did not imply that the jury should find defendant guilty because he failed to produce his own evidence, or prove a defense, but argued essentially that the defense offered no explanations or answers to the prosecution's evidence and argument, other than that its case was messy. The trial court also instructed the jury that defendant had no obligation to do anything at all and had a right not to present any evidence. Thus, even if the prosecutor's comments were deemed improper, reversal would not be warranted given that the instructions cured any potential harm from the comments. *Abraham, supra*.

Defendant next asserts that there was insufficient evidence to support the conviction of first-degree premeditated murder because other suspects could have committed the crime. Defendant points out that other suspects taken into custody on the night of the crime were found to have gunshot residue on their hands. However, notwithstanding this fact, when viewed in a light most favorable to the prosecution, the evidence was sufficient to support defendant's identity as the shooter. Brewster's eyewitness testimony, if believed by the trier of fact, was sufficient evidence to convict. There was also corroborating testimony from another witness, who observed the crime and believed that defendant resembled the shooter. Moreover, defendant's cousin testified that defendant admitted to him that he shot at Merriweather, although he claimed it was in self-defense. There was also physical evidence and ballistics evidence supporting defendant's conviction. We will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

Defendant's final argument is that he was denied his due process rights when the trial court gave three erroneous instructions to the jury. This Court reviews claims of instructional error de novo. *People v Hubbard*, 217 Mich App 459, 487; 552 NW2d 493 (1996). A trial court must instruct the jury as to the applicable law, and the instructions must clearly present the case to the jury. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* at 124.

Defendant contends that the trial court's instruction regarding specific intent was improper, specifically challenging the following statements:

Now sometimes, but not often, frankly, people announce out loud in some words what it is they're thinking or what they're planning on doing. Sometimes, after people have done something, they report to others in so many words why they did what they did and what they were thinking. But, that doesn't happen all that often. It's more common that people don't say, either in advance or afterwards, why they were doing what they did and what they were thinking at the

time. They don't say, "I thought about it ahead of time, I deliberated, this was my intent," et cetera. That doesn't mean, however, that it can't be decided. It simply means that it has to be decided inferentially rather than directly.

Defendant asserts that this instruction implied to the jury that defendant, by not speaking, had something to hide. Defendant argues this is the same as raising an adverse inference from defendant's exercise of his post-arrest, post-*Miranda*¹ silence, which is prohibited. *People v Gallon*, 121 Mich App 183, 187; 328 NW2d 615 (1982). However, viewed in context the instruction informed the jury that intent need not be proven by direct evidence, but could be inferred from the facts and circumstances. This is a correct statement of the law. See *People v Beaudin*, 417 Mich 570, 575; 339 NW2d 461 (1983).

Defendant also claims that the lying in wait and aiding and abetting instructions were improper. We find no reversible error in these instructions.²

Affirmed.

/s/ David H. Sawyer
/s/ Janet T. Neff
/s/ Helene N. White

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

² As to the objections to these instructions, the trial court acknowledged that it augmented the standard jury instruction on specific intent, as it has done for fifteen years, and that it read several instructions not requested by either party. Although we find no error requiring reversal, we observe that prudence and fairness dictate that in the future the court notify the parties of the contemplated departures and additions before closing arguments.